NO. 84223-0

IN THE SUPREME COURT OF WASHINGTON

(Court of Appeals No. 62142-4-I)

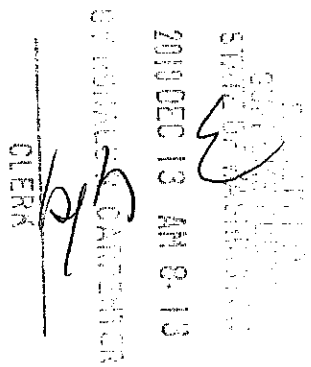
STATE OF WASHINGTON,

Respondent,

v.

ROGER WRIGHT,

Appellant.



Petitioner's ~~APPELLANT'S~~ SUPPLEMENTAL BRIEF

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A. IDENTITY OF PETITIONER

Petitioner Roger Wright was the Appellant in the Court of Appeals and the Defendant in the King County Superior Court proceeding from which this appeal was taken.

B. PROCEDURAL POSTURE

Roger Wright was originally convicted of two counts of possession of marijuana and MDMA following the denial of his motion to suppress. After direct appeal to the Court of Appeals, his convictions were upheld. The Appellant then filed a motion for reconsideration in light of the United States Supreme Court decision in *Arizona v. Gant*, __ U.S. __, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009). The Court of Appeals again affirmed the trial court's rulings.

Mr. Wright then filed a petition for discretionary review to the Supreme Court of Washington. The petition was accepted. Mr. Wright submits the following supplementary brief to be considered with the original briefing filed with the petition for review.

C. ISSUES PRESENTED

1. Whether Washington courts have continued, since the filing of the Petition for Review, to apply *Gant* in a stricter manner, refusing to authorize searches of a vehicle incident to arrest of an occupant, where

there is no concern for officer safety, and no concern for the destruction or concealment of evidence.

2. Whether the trial court erred in finding that there were grounds to stop Mr. Wright for failing to have his headlights turned on even though the law did not require headlights at the time of the stop.

3. Whether the trial court erred in refusing to find that the stop of Mr. Wright was an illegal pretext for the search that followed.

D. STATEMENT OF THE CASE

The Appellant hereby incorporates the Statement of the Case and factual recitation set forth in the Petition for Discretionary Review to the Supreme Court of Washington at 3-7.

In summary, those facts establish that a police officer stopped Mr. Wright, an African American, for failure to have his headlights on even though it was not yet half an hour after sunset as required by law. The officer radioed for a backup, advising he was involved in "a suspicious vehicle stop." He then approached Mr. Wright and claimed to smell the odor of marijuana emanating from the car. The officer arrested Mr. Wright, placed him in handcuffs and handed him off to the backup officer, then requested a canine unit. The officers and dog then thoroughly searched the passenger compartment, finding marijuana, a scale and cash.

Only then did the officers obtain a search warrant for the trunk, where tablets of MDMA were found.

E. ARGUMENT: THIS COURT SHOULD REVERSE THE COURT OF APPEALS DECISION AND FIND THAT THE TRIAL COURT ERRED WHEN IT ADMITTED UNLAWFULLY OBTAINED EVIDENCE IN VIOLATION OF ARTICLE I, SECTION 7 OF THE WASHINGTON CONSTITUTION

The arguments set forth in the Appellant's Petition for Discretionary Review to the Supreme Court are hereby incorporated and briefly summarized. Petition for Discretionary Review at 7-20.

As argued there, Washington courts have routinely avoided reliance on the so called Scalia-exception to the search incident to arrest rule. Under Article I, Section 7 of the Washington Constitution, warrantless searches of vehicles for evidence of the crime of arrest are not valid unless the facts of the situation create an imminent risk to officer safety or the destruction or concealment of evidence.

In *Arizona v. Gant*, __ U.S. __, 129 S.Ct. 1710, 1723-24, 173 L.Ed.2d 485 (2009), the United States Supreme Court overruled the longstanding interpretation of *New York v. Belton*, 453 U.S. 454 (1981), and held that police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment or it is reasonable to believe the vehicle contains evidence of

the offense of arrest. In his concurrence, Justice Scalia wrote separately to express his opinion that he would hold "that a vehicle search incident to arrest is *ipso facto* 'reasonable' only when the object of the search is evidence of the crime for which the arrest was made, or of another crime that the officer has probable cause to believe occurred." *Id.* at 1724 (Scalia, J., concurring in judgment).

Two post-*Gant* decisions by this Court clarified Washington's law on vehicle searches incident to arrest of a recent occupant. In *State v. Valdez*, 167 Wn.2d 761, 224 P.3d 751 (2009), this Court authorized warrantless searches "only to remove any weapons the arrestee might seek to use in order to resist arrest or affect an escape and to avoid destruction of evidence by the arrestee of the crime for which he or she is arrested." *Id.* at 778. In *State v. Patton*, 167 Wn.2d 379, 219 P.3d 651 (2009), this Court again invalidated a warrantless search of a vehicle:

> We hold that an automobile search incident to arrest is not justified unless the arrestee is within reaching distance of the passenger compartment at the time of the search, and the search is necessary for officer safety or to secure evidence of the crime of arrest that could be concealed or destroyed.

Id. at 384 (fn. omitted). The Court explained that the search incident to arrest exception "must be narrowly applied, consistent with its common

law origins allowing an arresting officer to search the person arrested **and the area within his immediate control.**" *Id.* (emphasis added).

As argued in the Petition for Review, the search of Mr. Wright's car was unlawful under both *Patton* and *Valdez.* Mr. Wright had been removed from his car, placed in handcuffs, and secured in the back of a patrol car under the supervision of a second officer. He was no longer within "reaching distance" of the passenger compartment of the car. There was no evidence that the officers were in danger at the time of the search. At the time of the search, there was likewise no danger that evidence would be concealed or destroyed.

1. Recent Washington Cases Have Continued to Apply *Gant* in Accordance with the Stricter Requirements of Article I, Section 7

Since the filing of the Petition for Review, Washington courts have continued to limit vehicle searches incident to arrest of an occupant to situations where there is a concern for officer safety or danger of destruction or concealment of evidence.

a. *State v. Chesley* recognizes that there is no blanket exception permitting search incident to arrest for evidence of the crime of arrest

In *State v. Chesley*, ___ Wn.2d ___, 239 P.3d 1160 (2010), the Washington Court of Appeals, Division Two, held that evidence that was seized pursuant to a warrantless search incident to arrest of a car should

have been suppressed, despite the fact that the evidence was relevant to the crime of arrest. In that case, the officer was on patrol when he was alerted that a bait car alarm had been activated. *Id.* at 1163. The officer responded to the parking lot and saw the defendant standing between the bait car and another car. *Id.* As the officer drove up, the defendant jumped into the other car's driver seat. *Id.* When other officers arrived, Chesley was ordered to exit the car and was immediately handcuffed. *Id.* The officer saw that the bait car's door lock had been punched through. *Id.* He then looked through the window of the defendant's car and saw tools on the floorboard, including hammers, picks, screwdrivers, and electrical items. *Id.* The officer then formally arrested the defendant and searched the car incident to arrest. *Id.*

During the search of the car, the officers found items that had been reported stolen. *Id.* They obtained a telephonic warrant to search the trunk, in which they later found a gun and other items. *Id.* Based on this evidence, the defendant was convicted of first degree possession of stolen property and possession of a stolen firearm. *Id.* at 1163.

The Court of Appeals applied post-*Gant* Washington case law, and held that there was not authority to search Chesley's car without a warrant. *Id.* at 1165-1166. The Court restated the rule from *State v. Patton*, 167 Wn.2d 379, 219 P.3d 651 (2009), as follows:

> the search of a vehicle incident to the arrest of a recent occupant is unlawful absent a reasonable basis to believe that the arrested poses a safety risk or **that the vehicle contains evidence of the crime of arrest that could be concealed or destroyed, *and that these concerns exist at the time of the search.***

Chesley, 239 P.3d at 1165, *quoting Patton*, 167 Wn.2d 394-95 (emphasis added). The Court further interpreted *State v. Valdez*, 167 Wn.2d 761, 224 P.3d 751 (2009) as limiting such searches for situations where "the search is necessary to preserve officer safety or **prevent destruction or concealment of evidence of the crime of arrest**." *Chesley*, 239 P.3d at 1165, *quoting Valdez*, 167 Wn.2d at 777 (emphasis added).

Importantly, the *Chesley* Court noted that the officer had reason to believe that Chesley's car contained evidence of a car prowl, the crime for which he was arrested. *Chesley* 167 P.3d at 1165. However, in applying the rule articulated in *Patton* and *Valdez*, the Court stated "nothing in the record indicates that Officer Sapinoso searched Chesley's car to prevent destruction or concealment of evidence." *Id.* The arrestee and the other occupants were in custody at the time of the search. *Id.* There was no reason to believe that the arrestee posed any kind of safety risk. *Id.* The Court stated: "We hold the search incident to Chesley's arrest was unlawful because it was not necessary at the time of the search to preserve

officer safety or prevent concealment or destruction of evidence of the crime of arrest." *Id.* at 1165-66.

The situation in *Chesley* is directly analogous and legally indistinguishable from the facts in the instant case. Roger Wright was hand cuffed and placed under arrest for possession of marijuana based on the officer's claim there was a strong odor of marijuana coming from the car. Wright was secured in the patrol car at the time the officer proceeded to search the car incident to arrest for evidence of the crime of arrest: possession of marijuana. In the course of this intrusive search with the aid of a canine unit, the officer located marijuana, MDMA, and a scale. During the entirety of this search, Wright was secured in the patrol car, so there were absolutely no concerns for officer safety or destruction of evidence.

Therefore, under the reasoning of *Chesley*, the search of Mr. Wright's car was clearly unconstitutional.

b. *State v. Afana* confirms that under *State v. Patton* and *State v. Valdez*, Washington does not recognize the Scalia-exception to the search incident to arrest rule

In *State v. Afana*, 169 Wn.2d 169, 233 P.3d 879 (2010), this Court reiterated the rule from *Patton* and *Valdez* that Article I, Section 7 of the Washington Constitution requires a search warrant in the absence of

exigent circumstances. In this case, a passenger riding in a car was arrested for a misdemeanor trespass warrant. *Id.* at 174. A search of the vehicle incident to arrest turned up drugs, paraphernalia, and a scale. *Id.* This Court stated that:

> In view of *Gant* and our recent decisions in *Patton* and *Buelna Valdez*, the question before us, further refined, is whether the search in this case was justified by a concern for the safety of the arresting officer or the concealment or destruction of evidence of the crime of arrest.

Afana, 169 Wn.2d at 178. The *Afana* Court then held that the search was unlawful because neither concern was present. *Id.*

Therefore, contrary to the reasoning of Division I, below, none of these cases, *Patton*, *Valdez* and *Afana*, recognize a blanket exception authorizing officers to search vehicles incident to arrest of the driver simply to gather evidence of the crime of arrest. There must be a separate concern for (1) officer safety, or (2) the concealment or destruction of evidence.

In this case, Mr. Wright was in handcuffs in the back of the patrol car at the time of the search. There was no concern for officer safety, and no concern for the concealment or destruction of evidence. Under current Washington law, the search of Mr. Wright's car was unlawful.

c. Under *State v. Tibbles*, the exigencies of officer safety and the risk of destruction of evidence do not exist in this case

The original reason for the existence of the search incident to arrest exception was to ensure officer safety and prevent the destruction or concealment of the crime of arrest. *Patton*, 167 Wn.2d at 386, *citing State v. Ringer*, 100 Wn.2d 686, 693-700, 674 P.2d 1240 (1983). These two factors are "exigencies." *See Patton*, 167 Wn.2d at 486. Although the search incident to arrest exception is different from the exigent circumstances exception, there is necessarily some relationship between the two doctrines. Officer safety and the destruction or concealment of evidence are both exigent circumstances justifying an exception to the warrant requirement. *See State v. Counts*, 99 Wn.2d 54, 60, 659 P.2d 1087 (1983) (exigent circumstances include: "(1) hot pursuit; (2) fleeing suspect; (3) danger to arresting officer or to the public; (4) mobility of the vehicle; (5) mobility or destruction of the evidence.").

Although not a search incident to arrest case, *State v. Tibbles*, 169 Wn.2d 364, 236 P.3d 885 (2010), decided August 5, 2010, underscored the reasoning behind the two exigencies that are the focus of the exception. In *Tibbles*, the officer stopped the defendant's car for a defective taillight. *Id.* at 367. Upon making contact with the driver, the

officer smelled a strong odor of marijuana. *Id.* The officer asked the driver to step from the car and proceeded to search the interior of the car. *Id.* at 368. The officer found marijuana and drug paraphernalia. *Id.* The officer did not arrest Tibbles, but rather confiscated the contraband, and cited and released the defendant. *Id.*

Because Tibbles was never under arrest, the search incident to arrest doctrine did not apply. Rather, the State relied on a generalized exception to the warrant requirement for "exigent circumstances." *Id.* at 370. After considering the possible exigent circumstances noted above from *Counts*, this Court found that none of the exigencies applied. *Id.* at 371, *quoting Counts*, 99 Wn.2d at 60.

Specifically relevant to the instant case, this Court noted in *Tibbles* that there was no factual basis to conclude that the destruction of evidence was imminent, nor was there any concern for officer safety. *Tibbles*, 169 Wn.2d. at 371-72. This Court reasoned that, in order to find exigent circumstances on these facts "would give the erroneous impression that an exigency may be based on little more than a late-night stop for defective equipment, an officer working alone, and circumstances indicating possible drug possession." *Id.* at 372. "At best, the State has shown it was expedient for Trooper Larsen to conduct the search as he did." *Id.*

Other than the fact that the defendant was not arrested, the facts in *Tibbles* are nearly identical to the facts in Mr. Wright's case. Both Mr. Wright and Mr. Tibbles were stopped for traffic infractions. In both cases, the officers' suspicions were aroused by the smell of marijuana. Probable cause existed in both cases to arrest the defendants based on the smell of marijuana.[1] Illegal drugs were found as a result of searches incident to arrest of the cars that both defendants were driving. In both cases, there was no concern for officer safety, and there was no concern that evidence of the crime of arrest would be destroyed or concealed.[2]

This Court should apply the reasoning of all these cases, reverse the Court of Appeals and hold that, in Roger Wright's situation, there was no concern for officer safety and no concern for the destruction or concealment of evidence. Accordingly, this Court should reject the so-called "Scalia exception" to *Gant* and hold, under Article I, Section 7 that this search was unconstitutional, the evidence must be suppressed and the charges dismissed.

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[1] *See id.* 373, n.4 ("It should be noted that Trooper Larsen likely had probable cause to arrest Tibbles based on the strong odor of marijuana coming from the car.")

[2] This Court noted in *Tibbles* that the decision only contemplated the exigent circumstances exception, and did not apply other exceptions that might have been available in similar circumstances. *Id.* at 373, n.4. Nevertheless, *Tibbles* dealt with the same two exigencies under nearly identical facts.

2. The Original Stop of Mr. Wright Was Unlawful Because the Officer Did Not Have Probable Cause to Stop Him for a Traffic Infraction and Because the Stop was Pretextual

The Appellant stands by its previous arguments that: (1) The officer did not have grounds to stop Mr. Wright for a headlight violation because headlights were not required at the time that he was stopped; (2) The stop of Mr. Wright was pretextual. Petition for Discretionary Review at 15-18. The arguments made in the Petition for Discretionary Review are hereby incorporated by reference.

F. CONCLUSION

Washington courts have continued to interpret Article 1, Section 7 of the Washington Constitution as prohibiting warrantless vehicle searches incident to the arrest of a recent occupant where there is no concern for officer safety, and no concern for the destruction or concealment of evidence. The rationale of *Patton* and *Valdez*, as articulated by this Court in *Afana* and applied by Division Two in *Chesley*, prohibits searches once the defendant has been safely removed and secured in a police vehicle, as occurred in this case.

Appellant also urges this Court to find that the initial stop was invalid because there was no lawful basis to stop Mr. Wright for a traffic infraction, and because the stop was pretextual.

Accordingly, all the fruits of this search, including those uncovered through the execution of a tainted warrant, must be suppressed. And, in the absence of any admissible evidence, the charges should be dismissed with prejudice. *State v. B.J.S.*, 140 Wn.App. 91, 97 n.2, 169 P.3d 34 (2007); *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980); *Jackson v. Virginia*, 443 U.S. 307 (1979).

RESPECTFULLY SUBMITTED this 9th day of December, 2010.

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PROOF OF SERVICE

Richard Hansen swears the following is true under penalty of perjury under the laws of the State of Washington:

On the 9th day of December, 2010, I sent by U.S. Mail, postage prepaid, one true copy of Appellant's Supplemental Brief directed to attorney for Respondent:

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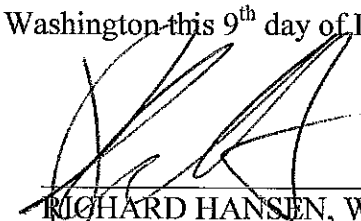
And mailed to Appellant Roger Sinclair Wright.

DATED at Seattle, Washington this 9th day of December, 2010.



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